Thorn Americas, Inc. *and* Local 58, International Brotherhood of Electrical Workers, AFL–CIO, Petitioner. Case 7–RC–20183

August 31, 1994

DECISION AND DIRECTION

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

The National Labor Relations Board, by a three-member panel, has considered a determinative challenge in an election held on December 10, 1993, and the attached pertinent portions of the Regional Director's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows four for and four against the Petitioner, with one determinative challenged ballot.

The Board has reviewed the record in light of the exceptions and brief and has decided to adopt the Regional Director's findings and recommendations.

The Employer challenged the ballot of Gerald Evans on the ground that Evans had no reasonable expectation of returning to work after incurring a work-related injury and accepting a position with another employer. The Regional Director found that Evans retained his employee status during the payroll eligibility period and on the election date, and recommended that the challenge be overruled. In so finding, the Regional Director applied the test set forth in *Red Arrow Freight Lines*, 278 NLRB 965 (1986) (an employee absent from work due to illness or injury is presumed to retain both employee status and voting eligibility, unless the party seeking to rebut that presumption shows that the employee resigned or was discharged).

In its exceptions, the Employer relies on *Advance Waste Systems*, 306 NLRB 1020, 1032 (1992), to support its contention that the ''reasonable expectation of employment'' test is the appropriate test rather than the test set forth in *Red Arrow*. We disagree with the Employer and find, in agreement with the Regional Director, that *Red Arrow* is the appropriate test.

In *Advance Waste* the judge found that an employee was ineligible to vote because he was laid off with no reasonable expectation of being recalled due to a work-related injury.[1] *Advance Waste* is distinguishable on the ground that the employee in that case was ''permanently laid off'' at the time of the election.[2] The Board has found that the ''reasonable expectation of employment'' test applies to eligibility determinations involving laid-off employees, but not employees on sick leave. *Edward Waters College*, 307 NLRB 1321, 1322 fn. 6 (1992).

To the extent that *Advance Waste* is ambiguous and can be construed as applying a ''reasonable expectation of employment'' test to sick leave cases, we disavow such a construction and adhere to the *Red Arrow* test in sick leave cases. See, e.g., *Edward Waters College*, supra (a post-*Advance Waste* case applying *Red Arrow*).

The Regional Director correctly applied *Red Arrow* in the instant case. Evans was an eligible voter, because the Employer failed to show that Evans resigned or was discharged from his employment prior to the election.[3] Accordingly, we agree with the Regional Director that the Employer's challenge to Evans' ballot should be overruled. We shall therefore direct the Regional Director to open and count Evans' ballot, serve on the parties a revised tally of ballots, and issue the appropriate certification.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 7 shall, within 14 days from the date of this Decision and Direction, open and count the ballot of Gerald Evans, prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification.

[1] The Board's decision did not specifically discuss this issue.

[2] 306 NLRB at 1027.

[3] We agree with the Regional Director, for the reasons stated in his report, that Evans' acceptance of a position with another employer did not affect his eligibility. He did not begin work for that employer until after the election.

APPENDIX

REGIONAL DIRECTOR'S REPORT AND RECOMMENDATION ON DETERMINATIVE CHALLENGED BALLOT

The ballot of Gerald Evans was challenged by the Employer on the basis that he has been on a sick or medical leave of absence due to an injury sustained to his arm and that he has no reasonable expectancy of return. Additionally, the Employer contends that Evans' acceptance of a job with another employer prior to the election rendered him ineligible to vote. Petitioner contends that, as of the election date, Evans was on sick leave and, hence, was eligible to vote in the election.

I. INVESTIGATION

The basic facts are not in dispute. Evans was hired by the Employer on February 11, 1991, as an electronic service technician to repair consumer electronics, including stereos, computers, televisions, and video cassette recorders. At the time of his hire, he had a partially paralyzed left arm and left leg as a result of a childhood injury. On February 9, 1993, Evans injured his right elbow while at work. The following day he advised Regional Service Manager Alan Kaufman of the injury, explaining that he was experiencing pain in his right wrist and forearm, and that he was going to see a doctor. Evans saw a physician on February 10; his arm was placed in a sling and he was instructed to remain off work through February 16. Evans, however, returned to work on

February 15 with a doctor's note stating he could not perform heavy lifting, bending, or turning of his right arm. He was given light assignments and continued to receive therapy. On February 24, he gave the Employer a physician's note stating that he could not turn or twist his right hand and arm, and could not push or pull items weighing over 25 pounds. Kaufman stated to Evans that because of his limitations the Employer had no work available for him.

On about March 10, Evan was referred to an orthopedic specialist whom he saw on March 17. He obtained a release from the specialist to return to work on April 26 without restriction. Evans worked on April 26, but the next day advised Kaufman that he was experiencing intense pain and could not use his right arm. Kaufman informed Evans that he would not be accepted back to work until he received a full release from a doctor stating he was able to lift items weighing between 35 and 50 pounds. A letter to this effect was sent by the Employer to its workers' compensation insurance carrier, and a copy given to Evans. On about May 1, Evans was examined by another doctor who apparently found him fit to work. On May 5, Evans obtained a referral to the Michigan Hand Rehabilitation Center for therapy and a doctor's note stating that he was unable to work ''for the present time.'' When he proffered this note to the Employer, he was advised that the other doctor stated he was capable of working.

On about March 10, Evans began receiving workers' compensation payments from the Employer's insurance carrier. The checks ceased in May but resumed again in June after Evans retained an attorney and continued until December when the checks again ceased. In June, the Employer's insurance carrier reclassified Evans' case status from medical injury to vocational rehabilitation.[1] A rehabilitation counselor was assigned to Evans at that time. In December, Evans began working for Welding Metals, Inc. as a service repairman repairing electronic welding equipment and earning approximately $1 an hour less than at the Employer.

There is a dispute as to when Evans accepted a position with Welding Metals, as well as when he began working for that company. According to Evans, he was interviewed on December 13, was offered and accepted employment on December 17, and commenced working on December 20. The Employer asserts that Evans accepted a position with Welding Metals on December 7, that he was scheduled to begin work on December 20, but did not actually start until December 23. Based on documentary evidence and affidavit testimony of individuals employed by Welding Metals who are neutral to this proceeding, I find that Evans was interviewed, offered, and accepted a full-time position on December 1, and began working for that company on December 20.

There is also disagreement as to when Evans last had contact with the Employer prior to the election. Evans asserts that he visited the shop in September and talked to Assistant Manager Dave West about not having received an unemployment check for 2 weeks. At that time, Evans also inquired at the Employer about a job opening for regional service manager and applied for the position through his rehabilitation counselor. Additionally, Evans asserts that the counselor advised him on a monthly basis that the Employer had been contacted and that no work was available for any type of restriction. The Employer does not deny that Evans submitted an application for the regional service manager position, but contends that it has not had any contact with him since July and that it is unaware of any job inquiries from the rehabilitation counselor.

[1] Apparently, the determining factor in reclassifying Evans was anticipated length of recovery time.

II. DISCUSSION AND ANALYSIS

In order to be eligible to vote in an NLRB-conducted election, an individual must be employed in the appropriate bargaining unit during the requisite payroll eligibility period and on the day of the election. *Case Egg & Poultry Co*., 293 NLRB 941, 943 (1989); *Plymouth Towing Co*., 168 NLRB 651 (1969). An employee absent from work due to illness or injury is presumed to retain both employee status and voting eligibility. A party seeking to rebut that presumption must make an affirmative showing that the employee either has resigned or has been discharged. *K Van Bourgondien & Sons, Inc*., 294 NLRB 268, 274–275 (1989); *Red Arrow Freight Lines*, supra, 278 NLRB 965 (1986); *Iron Mountain Forge Corp*., 278 NLRB 255, 257 (1986); *Edward Waters College*, supra, 307 NLRB 1321 (1992); *Atlantic Dairies Cooperative*, 283 NLRB 327 (1987); *Wright Mfg. Co*., 106 NLRB 1234, 1236 (1953).

The same standard is applied to employees who suffer work-related injuries and are receiving workers' compensation. *Custom Bent Glass Co*., 304 NLRB 373, 374 (1991); *Jennings & Webb, Inc*., 288 NLRB 682, 696 (1988); *J. P. Stevens & Co*., 247 NLRB 420, 482 (1980); *Liston Aluminum*, 296 NLRB 1181, 1203 (1989). In *J. P. Stevens*, supra, employees on leave for 6 and 10 months and who were receiving workers' compensation were deemed eligible. Similarly, in *Atlantic Dairies*, supra, an employee on medical leave for 3 years was determined to be eligible.

Clearly, there is no evidence that Evans resigned or was discharged. He attempted on two occasions to return to work, albeit unsuccessfully. Further, no evidence was presented to establish that his injuries were of such a nature that it would not be possible for him ever to return to his former position.

The Employer, however, citing *Advance Waste Systems*, supra, 306 NLRB 1020 (1992), argues that with respect to the instant case, a reasonable expectation of future employment test should be applied. While the Board did not specifically pass on the language used by the administrative law judge in *Advance Waste*, or her treatment of this issue as one involving reasonable expectancy of recall, I believe the correct test in such cases is that set out in *Red Arrow Freight*, supra, that employees on sick leave are presumed to retain employee status and, hence, eligibility, ''unless or until the presumption is rebutted by an affirmative showing that the employee has been discharged or has resigned.'' The Board added at footnote 4 therein:

> The ''reasonable expectation of employment'' test . . . applies to eligibility determinations involving laid-off employees (*Higgins, Inc*., 111 NLRB 797, 799 (1955)), although in some isolated cases the Board may have inadvertently used such language in cases involving employees on sick or maternity leave (e.g., *Sexton Welding Co*., 96 NLRB 454, 455, 456 (1951); *Price's Pic-Pac Supermarkets*, 256 NLRB 742, 743 (1981), enfd. 707 F.2d 236 (6th Cir. 1983)).

See also *Edward Waters College*, supra at 1322 fn. 6, where the Board reiterated that the ''reasonable expectation of employment'' test applies to laid-off employees, not those on sick leave. Cf. *A & J Cartage, Inc*., 309 NLRB 319 (1992).

A question still remains as to whether Evans' acceptance of a position with another employer prior to the election renders him ineligible to vote. I find that it does not. In an analogous situation, employees who tender notice of their intention to retire or resign are eligible to vote if they are still employed on the date of the election. *Columbia Steel Casting Co*., 288 NLRB 306 fn. 4 (1988); *Harold M. Pitman Co*., 303 NLRB 655 (1991); *Computed Time Corp*., 228 NLRB 1243, 1250–1251 (1977). Evans did not resign, nor was he discharged prior to the date of the election. Further, Evans did not commence working at Welding Metals until December 20, and events which occur after an election do not affect an employee's voting eligibility in that election. *Pen-Mar Packaging Corp*., 261 NLRB 874 (1982). Accordingly, I find that Evans enjoyed employee status both during the payroll eligibility period and on the election date and that, therefore, he is an eligible voter.